only 4 of the 13 directors as required under article 71. What actually happened? The first-named plaintiff sent in a notice of resolution proposing to remove all 13 directors and to appoint the same number. In other words, this plaintiff, in addition to the proposal to remove 4 directors which he could validly do under the articles, wanted to remove the remaining 9 directors who, under the articles, were still in office. Had the new Act not been passed I think he could have succeeded because under the Companies Ordinances 1940-1946 there was no corresponding section to section 128 of the new Act. With the coming into force of the new Act we have a new section, that is, section 128 which expressly requires special notice of at least 28 days in order to propose the removal of a director before his term of office expires. That condition precedent, to my mind, was not fulfilled. It may also be worth noting that that section corresponds with and was taken from section 120 of the Companies Act 1958 pertaining to the State of Victoria. In Victoria too that is a new section. It was introduced in that State in the 1958 Act, having been copied from the English Companies Act 1948, section 184.

In the circumstances of this case it does seem to me that the appointment of the directors named in paragraph 10 of the statement of claim was not proper and valid.

With regard to the alternative defence I have no hesitation in coming to the conclusion that there was duress and undue influence.

It was never disputed that the annual general meeting was held at 8.30 p.m. on 30th September, 1966 and continued to the following noon of 1st October, 1966. At about 3.00 a.m. of the 1st of October there was a deadlock concerning the election of directors. The two lawyers left the meeting and others did likewise. Some of the shareholders slept in the premises while some went out for tea. The meeting was never formally adjourned although there was a suggestion by the chairman that as the meeting had gone on for such length of time without any decision having been reached it should be adjourned. The plaintiffs and their supporters objected to such adjournment, demanding that the meeting should only end after the election of directors. To my mind they appeared to be persistent in their demand for they refused to allow the buses to take to the road at 6.15 a.m. unless their resolution was carried out. There is evidence, which I accept, that a bus was placed in the gate-way so as to prevent the other 20 buses from leaving the premises. There is also evidence, which I accept, that no one dared to remove the bus which caused the obstruction. It would not be unfair to say that at that stage of the so-called meeting, to quote the words of a witness (Sim Sin Choy) there was confusion. No doubt there was no violence, but it is not difficult to imagine the chaotic state of affairs that existed unless the plaintiffs' resolution was passed. That state of affairs continued until 12.00 noon on 1st October, 1966 when the presiding chairman declined to take the chair any further and left. A director, Loh Chan, was roused from his sleep at 12.15 p.m. by the plaintiffs and plaintiff No. 1 proposed him as chairman and the proposal was carried. He took the chair and it was then that the present plaintiffs were unanimously elected directors. It may be interesting to note that the company was summoned and fined a sum of $300 for failing to run their buses on the road at 6.15 a.m. on 1st October, 1966. The company has been warned against such repetition by the Road Transport Licensing Board.

Those are the facts which I have no reason to reject. The meeting commenced at 8.30 p.m. and at 3.00 a.m. no decision was reached. In those circumstances it should have been adjourned and the articles of association provide for such contingency. However, the suggestion was contumeliously rejected by the plaintiffs and their supporters. In my view, the meeting continued under abnormal and unreasonable circumstances. It was held under pressure. To my mind, this is a clear case of one party exercising domination over the minds and wills of the other party so that their independence of decision was substantially undermined.

It was said by counsel for the plaintiffs that the present facts do not establish duress or undue influence. I disagree with him. This is a clear case of duress. This is also a clear case of undue influence. The categories of undue influence are never closed. All the circumstances of each case have to be considered to determine whether there is undue influence. For if it were otherwise, the law would fail to protect the ever-expanding interests of the community.

For the above reasons I would dismiss this case with costs.

Claim dismissed.

Solicitors: *Braddell & Ramani; Morris Edgar & Co.*

YONG MOK HIN v. UNITED MALAY STATES SUGAR INDUSTRIES LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and MacIntyre J.) February 16, 1967]

[K.L. — Federal Court Civil Appeal No. X.50 of 1966]

Contract — Building contract — Entire or instalment contract — Non-completion of work — Breach — Novation — Damages — Contracts (Malay States) Ordinance, 1950, ss. 40, 63, 65, 66 & 75.

Practice and Procedure — Appeal — Point taken first time on appeal — When may be entertained.

This was an appeal from the judgment of Raja Azlan Shah J. ([1966] 2 M.L.J. 286). The appellant a building contractor claimed the sum of $90,585 against the respondent. The particulars of the claim were (a) amount due on account of appellant's materials used and damaged by the respondent company while erecting machinery in factory . . . $13,800; (b) alteration to original construction of office and 2 stores on lots Nos. 249, 250 and 979 at $13,595 each . . . $40,785; (c) 5th progress payment recommended by architect etc. . . . $36,000.

The respondents denied owing the amount claimed and counterclaimed for damages for breach of contract. In the court below the learned trial judge held that the appellant was entitled to $79,355 in respect of his claim on the above items with interest thereon at 6% per annum from December 24, 1964 to June 22, 1966 and the respondents were entitled to damages for breach of contract in the sum of $105,135.75 with costs of the claim and counterclaim. The learned judge then purporting to act on the authority of *Hanvale* v. *Green* (1) dismissed the appellant's claim and entered judgment for the respondents for $25,780.75 and costs. On appeal,

Held: (1) as the parties were aware at the trial that the claim for $13,800 under item (a) included the claim for costs of levelling, and documentary evidence in support thereof was admitted without objection, the finding of the trial judge allowing the full amount claimed under that item should stand;

(2) the decision of the trial judge to allow the appellant's claim for $13,595 in respect of one of the stores (store A) was in accordance with the evidence but the reason behind his decision to allow $7,980 each in respect of the other two stores was incomprehensible and the claim in respect of the said two stores should be disallowed;

(3) as the contracts were lump sum or entire contracts the appellant was not entitled to progress payment under item (c); however the learned judge was right in allowing the full amount of $36,000 under item (c) because of sections 40, 65 and 66 of the Contracts (Malay States) Ordinance;

(4) the judgment of the trial judge should be set aside and judgment entered for the appellant for $63,395 with interest at 6% per annum from December 24, 1964 to the date of realisation and costs of the suit. There will be judgment for the respondents on the counterclaim for delay and loss of use of two stores for $5,001 and costs.

Discussions on points taken first time on appeal.

Cases referred to:—

(1) *Hanvale* v. *Green* [1958] 2 W.L.R. 775.

(2) *Sumpter* v. *Hedges* [1898] 1 Q.B. 673.

(3) *Sahu Ram Kumar* v. *Muhammad Yakub & Anor.* A.I.R. 1924 P.C. 123.

(4) *Muralidhar Chatterjee* v. *International Film Co. Ltd.* A.I.R. 1943 P.C. 34.

(5) *Balak Ram* v. *Telu* A.I.R. 1935 Lahore 897.

(6) *Attorney-General* v. *Pang Ah Yew* [1934] M.L.J. 184, 187.

(7) *Banbury* v. *Bank of Montreal* [1918] A.C. 626, 659, 705, 714.

(8) *"Tasmania"* case (1890), 15 App. Cas. 233.

(9) *Hadley* v. *Baxendale* (1854), 9 Ex. 341; 23 L.J. Ex. 179.

(10) *Haji Hassan* v. *Tan Ah Kian* [1963] M.L.J. 175.

FEDERAL COURT.

Dato' R. P. S. Rajasooria (*V. K. Palasuntharam* with him) for the appellant.

H. Elias for the respondents.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal and a counter-appeal from the judgment of Raja Azlan Shah J. in Kuala Lumpur High Court Civil Suit No. 1319 of 1964. The appellant's claim against the respondent company was for the sum of $91,445 with interest at 6% per annum from 24th December, 1964 to date of realisation and costs. The particulars of the claim as stated in the specially endorsed writ are as follows:

"(a) Amount due on account of plaintiff's materials used and damaged by the defendant company while erecting machinery in factory	$13,800
(b) Alteration to original construction of office and two stores on lot Nos. 249, 250 and 979 at $13,595 each for 3 buildings	$40,785
(c) 5th progress payment recommended by the architect in accordance with the work completed but defendant company failed to pay	$36,000
(d) Plaintiff's hard-core stores used by defendants	$ 500
(e) Plaintiff's property 3 wheelbarrows used by defendants to cart stones damaged at $40 each	$ 120
(f) 4" x 6" pillars (hardwood) at $60 each (used by defendants)	$ 240
Total:	$91,445"

At the trial, the appellant abandoned his claim under items (d) (e) and (f) above, thus reducing the total claim to $90,585. The respondents denied owing the amounts claimed; and counter-claimed for damages for breach of contract.

In a written judgment dated 22nd June, 1966, the learned trial judge held that the appellant was entitled to a sum of $79,355 in respect of his claim under items (a) (b) and (c) of the statement of claim with interest thereon at 6% per annum from the 24th of December, 1964 to the 22nd of June, 1966; and that the respondents were entitled to damages for breach of contract in the sum of $105,135.75 with costs of the claim and counter-claim. Then purporting to act on the authority of *Hanvale* v. *Green*,(1) he dismissed the appellant's claim and entered judgment for the respondents for $25,780.75 and costs as aforesaid. In arriving at the figure of $25,780.75 the learned trial judge appears to have overlooked the amount due to the appellant by way of interest at 6% per annum on $79,355 for 18 months. However, the order of the court issued by the learned senior assistant registrar proclaims that judgment was entered for the plaintiff for $79,355 with interest at 6% per annum as aforesaid and that judgment was entered for the defendants for $105,135.75 with costs of the claim and counter-claim. This order, despite the fact that it remedies the arithmetical error apparent on the face of the written judgment is not only inconsistent with it but is not in the proper form. The learned senior assistant registrar has no power to alter the

form of the judgment delivered by the learned trial judge. In dismissing the plaintiff's claim and entering judgment for the defendants the learned trial judge had acted in accordance with the provisions of O. 21 r. 17 of the Rules of the Supreme Court which embodies the principle followed in *Hanvale* v. *Green, supra.*

The facts of the case briefly are as follows:

The appellant, a building contractor, entered into an oral agreement with the respondents on the 8th of August, 1963 to construct two stores for $105,000 and an office building for $82,500. Some of the terms of the agreement are the same mentioned in a letter (P.1) dated 29th of July, 1963 written by the appellant when tendering for the works. The tender was accepted on the 8th of August and the appellant agreed, as evidenced by a written undertaking (D.11) to accept $150,000 worth of shares in the respondent company as payment to account of the contract prices.

The work on the two projects started sometime in September 1963 but construction of the stores was delayed, first, because of the time taken to level the site for the stores — a requirement which surprisingly enough appears to have been overlooked when the contract price was fixed — and, secondly, because of structural changes made on the building from time to time at the instance of the respondents. The structural changes effected were the replacement of the zinc walls of the store building by 4½" brick walls, and later the replacement of the 4½" brick walls by 9" brick walls. In addition to these works the appellant also undertook to build a third store at the request of the respondents.

During the progress of the work the appellant received interim payments on *quantum meruit* less 10% retention money as certified by the architect. The first three progress payments were made in share scripts to the value of $129,000. The fourth, at the request of the appellant, was paid in cash amounting to $34,500. However, as a condition precedent to this payment he was asked to sign a document (P.3) dated the 6th of May, 1964, which he did. The document contained an undertaking to the effect that he will not receive any more progress payments and that he would accept the balance of the contract price only after the completion of the whole work.

At the trial the appellant denied knowledge of the contents of P.3 when he signed it but did not say what he thought he was signing. From the surrounding circumstances it would appear that he was in desperate need of money to meet the extra expenditure entailed by the structural changes and additions made to the original project. There can be little doubt that he signed P.3 unwillingly and under the stress of circumstance.

That the appellant was in short supply of money is further evidenced by the fact that in the month of July, notwithstanding his promise under P.3, he asked the architect to issue a certificate for the 5th progress payment. The architect, in view of P.3, turned down the application but later, on the intervention of the chairman of the board of directors of the respondent company, issued the 5th progress payment certificate (P.2) for $36,000. This sum, however, was not paid to the appellant because of the refusal of the managing director to sign the cheque. The appellant in consequence stopped work and refused to complete the same unless the payment was made.

By a letter (P.4) dated 4th September, 1964, the appellant's solicitor demanded of the respondents the payment of the 5th progress payment amounting to $36,000 within one week of receipt thereof. He also notified that if as a result of delay in payment his client failed to resume work, they will be held liable for any losses arising therefrom. In the reply (D.13) dated the 25th of September sent by the respondents' solicitors, Messrs. Shearn, Delamore & Co., the last sentence reads as follows:

> "In any event, our clients cannot allow this state of affairs to continue and, unless your client commences work within one week hereof, they have no alternative but to employ another contractor to complete the work and they will hold your client liable in the damages or loss that may arise from your client's wilful neglect."

On the 28th of September, the appellant abandoned work on the site and in consequence thereof the respondents' solicitors notified his sollcitor by letter (D.16) dated 7th October as follows:

> "Your client has been in default in that he failed to complete the work undertaken and such work will now have to be completed by another contractor. An investigation is being made by our clients' architect to verify the extent of the work done and the defects of which there are many, and our clients will hold your client liable in damages which they may suffer as a result of your client's failure to perform properly the contract and such damage may well be in excess of any claim which your client may have or hereafter make, the liability for which claim our clients hereby deny."

Then by a letter (P.17) dated the 26th of November, 1964, the respondents threatened that unless the appellant commenced substantial work within one week from date thereof and produced a bank guarantee that the work would be completed within a reasonable time, they had no alternative but to employ another contractor to complete the work.. By this letter the respondents appeared to have withdrawn their notice of the 7th of October rescinding the contract but the withdrawal must be treated as ineffective for once a contract is rescinded it becomes void and relieves the other party from any further obligation to perform it.

Some time later, according to the evidence of the managing director (D.W.4) the work was completed by another contractor. No evidence

was led by the respondents to indicate how much this contractor was paid for remedying the defects and how much for completing the work. His evidence as to the actual cost incurred by the respondents would have been the best evidence available but the respondents instead of calling him as a witness preferred to rely on an estimate prepared by Mr. MacDonald, a quantity surveyor. It could therefore be presumed under section 114 of the Evidence Ordinance that had the contractor been called, his evidence would not have been favourable to the respondents.

The appellant's claim in this action consists partly of a claim for work done and materials supplied outside the terms of any contract and partly in respect of amounts due under the contract subsisting at the time of the alleged breach. In the court below the respondents did not seriously challenge the evidence adduced in proof of the claim under the first part but in respect of the claim under the second part, they strongly contended that the contract as evidenced by P.1 was a lump sum contract and that interim payments were only optional at the discretion of the respondents and that further the appellant was bound by his undertaking under P.3 not to ask for progress payments. This issue was somewhat complicated by the fact that the parties had proceeded with the case on the footing that the original contract for the construction of two stores at a price of $105,000 (hereinafter referred to as contract A) and the contract for the construction of the office building at a price of $82,500 (hereinafter referred to as contract B) constituted one and not two independent contracts. I shall advert to this point when dealing with the claim under item (c) of the statement of claim.

The appellant's claim under item (a) of the statement of claim is for $13,800 being the alleged value of his materials used by the respondents. But, according to the evidence, the value of the materials used was only $2,600 and the balance of $11,200 was expended in levelling the building site. However, as the parties were aware at the trial that the claim for $13,800 including the claim for the cost of levelling, and documentary evidence (P.5) in support thereof was admitted without any objection on the part of the respondents, the finding of the learned trial judge allowing the full amount claimed under this item must stand.

The appellant's claim under paragraph (b) of the statement of claim is for $40,785, being the alleged cost of alterations done to the office building and two stores at a cost of $13,595 per building. However, in paragraph 3 of the reply to the statement of defence and counter-claim, the appellant avers that this expenditure was incurred for demolishing the zinc walls of three stores and replacing them by 6" brick walls and for demolishing the 6" brick walls and replacing them by 9" brick walls. There is a clerical error apparent here in that "6" walls" should be "4½" walls" but there can be no doubt, whatever, that what the appellant here avers is that the sum of $13,595 also included the cost of putting up the 9" walls. This averment is inconsistent with the evidence, for in a letter (P.7) dated the 6th of December, 1963, the appellant informed the respondents of how the figure of $13,595 was arrived at: According to P.7, the cost of and incidental to the demolition of the zinc walls of one store and rebuilding the same with 4½" brick walls was estimated at $21,575 less $7,980 being the value of the zinc sheets recovered by the appellant, thus leaving a balance of $13,595.

The learned trial judge appears to have come to the conclusion that the appellant had built 3 stores with zinc walls and then demolished the walls but that in respect of one store only did he replace the zinc walls by 4½" brick walls. At least this is what could be inferred from his judgment in which the relevant passage reads as follows:

> "P.W.2, the managing director testified that he had seen and checked the work with regard to P.7 and was satisfied with the work carried out and agreed that the plaintiff would be entitled three times $13,595. Between the two, I would prefer the evidence of the architect who, to my mind, would be the best person to testify on the matter. In the circumstances I will allow the full amount of $13,595 for store *A*, but in respect of stores *B* and *C* I will allow the amount specified for the zinc walls, that is, $7,980 each, making a total of $15,960. Therefore, under this item the plaintiff is entitled to a sum of $29,555."

The learned trial judge appears to have misdirected his mind on the evidence. What the architect said was, and I quote: "P.7 refers. Plaintiff estimated the extra work for $13,595. This work was done. $13,595 was in respect of one store. There are 3 stores built. Alterations made according to my instructions." What this evidence amounts to is that extra work done was in respect of one store only. The fact that 3 stores were built and alterations were made on the instructions of the witness does not mean that all three stores were originally built of zinc walls. Again the same witness said in cross-examination, and I quote: "Plaintiff had put up store *A*. Stores *B* and *C* not yet. Plaintiff had put up 4½" wall in respect of store *A*. He had not put up the 4½" wall in respect of stores *B* and *C*. Plaintiff had put up the zinc wall for store *A* according to the plan. He then had put up a 4½" wall. . . . Plaintiff started work in September 1963. By December 1963 he had partly completed the office and partly store *A*." Here again what the witness says in unequivocal terms is that zinc walls had only been put up in store *A* according to plan and that by December 1963 stores *B* and *C* had not even been built. This piece of evidence is significant in view of the fact that P.7 is dated the 6th of December

1963. It is abundantly clear that before the 6th December a decision had been taken to do away with the zinc walls and to have 4½" brick walls. Since stores *B* and *C* had not been built by December 1963, it is unlikely that they would have been built subsequently of zinc walls. It may be that they were built of 4½" brick walls and subsequently replaced by 9" brick walls but that cost has nothing to do with the present claim. Probably, that cost has been taken into account by the architect when preparing his certificates for progress payment. I say, 'probably', because according to the 5th progress payment certificate, the value of the work done on the stores up to 24th July, 1964 amounted to $145,000, whereas, according to the evidence of Mr. MacDonald (D.W.6), a quantity surveyor, the value of the work done on all three stores up to September 1964 was $113,500 only. However, Mr. MacDonald admitted in evidence that he was not aware that they were built originally of 4½" brick walls which were subsequently replaced by 9" brick walls. As the estimate made two months later is less than the earlier estimate by $31,500, the difference must represent the value of work done which is not apparent on the face of the building.

In this connection, I must say that, from the evidence it would appear as if the arrangement arrived at in regard to the demolition of the zinc walls of one store and their replacement by 4½" brick walls was regarded by the parties as an addition to the work under the original contract. I say this, because the cost was estimated in advance at $13,595 and was approved by the respondents before the work commenced and the amount was treated as an addition to the contract price of $105,000 to be paid after the completion of the whole work under the contract as evidenced by the fact that up to date the amount has not been paid. Whereas in regard to the work of rebuilding with 9" brick walls and the construction of a third store the evidence suggests that the arrangements were regarded by the parties as constituting a new contract since the value of the work was not estimated and approved in advance and since interim payments towards the contract price had been made on the basis of *quantum meruit*. But more of this later.

The decision of the learned trial judge to allow appellant's claim for $13,595 in respect of store *A* is in accord with the evidence but the reason behind his decision to allow $7,980 each in respect of stores *B* and *C* is incomprehensible. Even if stores *B* and *C* had been built of zinc and subsequently demolished, the sum of $7,980, according to P.7, represents the value of the zinc sheets recovered by the appellant and not an amount of liability accruing to the respondents. In the circumstances, the claim in respect of stores *B* and *C* should be disallowed.

The claim under item (c) is for $36,000 being the amount certified by the architect as due and owing by the respondents on account of the 5th progress payment. The respondents deny this claim, first, on the ground that the contract was a lump sum or entire contract in respect of which interim payments are not payable and secondly, on the ground that even if the amount was due and owing, the appellant was not entitled to it as he had given an undertaking in P.3 not to receive any further progress payment.

The appellant, on the other hand, avers that by mutual consent the terms of the original contract had been so altered as to constitute a new contract and contends that the contract which subsisted between the parties at the time of the alleged repudiation was not a lump sum or entire contract but one in respect of which the price was payable by instalments on *quantum meruit* less 10% retention money. In the alternative, he contends that even if the contract was a lump sum or entire contract, the respondents were still liable to pay for the value of the work done, since they had rescinded the contract by their letter dated the 7th of October 1964 and had thereby rendered themselves liable to restore any benefit they had received by virtue of the provisions of sections 65 and 66 of the Contracts (Malay States) Ordinance.

However, none of these provisions of law were cited or considered in the court below and the learned trial judge had proceeded on the basis that in regard to the claim under this item, the issues were first, whether the contract was a lump sum contract or not and, secondly, if it was not a lump sum contract whether the respondents were entitled to withhold payment by virtue of the undertaking in P.3?

I have already expressed my opinion, that the parties originally concluded two separate and independent contracts and not one, namely, contract "A" and "B" for the construction of two stores and an office building, respectively. The mode of payment of the contract price in respect of each contract is the same and stated separately in items A(4) and B(4) of P.1 as follows:

> "Advances may be made towards the contract during progress of construction at your (respondents') discretion. The balance will be paid when a certificate of fitness of occupation is received by the company from the Government."

These words can only mean what they say. The appellant is not entitled as of right to receive any advances on the contract price before the completion of the work unless the respondents, in the exercise of their discretion, paid any. These terms must also necessarily imply that the respondents, if they had been paying advances, may suspend payment if they thought fit to do so. The contracts are therefore lump sum or

entire contracts and the appellant is not entitled to progress payments. (See *Sumpter* v. *Hedges* [2]).

However, the evidence indicates clearly that when the 5th progress payment fell due, contract "A" was not subsisting between the parties, whereas contract "B" was. In respect of the work done under contract "A" the parties appear to have come to a fresh agreement which fundamentally altered the original plan — an agreement which, in my opinion, constituted a new contract. I shall only refer to a few facts to show the nature and extent of the changes. Under contract "A" the appellant contracted to build two stores with zinc walls and wooden pillars as indicated in plan P.22. Under the new agreement appellant contracted to replace the 4½" brick walls of two stores already constructed by 9" brick walls and to build a third store with 9" brick walls with all three stores under a common roof as shown in plan P.8. Whereas under contract "A" the appellant contracted to do the work for $105,000, under the new contract neither the contract price nor a schedule of costs was fixed. Whereas under contract "A" the work had to be completed by the 8th of February, 1964, the plan of work under the new contract was only issued on the 5th of February, 1964.

It would appear from the evidence of Mr. MacDonald that the financial consequence of the additions and alterations made in regard to the construction of the stores was to raise the cost of construction from $105,000 to $397,400. In *Sahu Ram Kumar* v. *Muhammad Yakub & Anor.*,[3] the Privy Council held that where as a result of additions made to the original contract the cost of construction became so substantial as to almost double the original cost then the cost should be attributed to a new arrangement between the parties.

From the fact that no price was fixed for the additional work involved which, judging from the evidence of the quantity surveyor, would have cost the appellant an additional expenditure of $292,400, it would be reasonable to presume in the absence of any evidence to the contrary, that the mode of payment was by instalments on the basis of *quantum meruit*. At page 195 of *Hudson*, a passage which I think is relevant, reads as follows:

> "Building contracts may not be entire contracts, firstly to the extent that they may contain specific provision for stage or interim payment, and secondly, because from their very nature, a term for such payments can be implied."

Again the fact that the respondents thought it important to obtain the appellant's signature on P.3 before parting with the money under the 4th progress payment certificate strongly suggests that they were attempting to get out of their bargain to pay by instalments, for if as they now say, the only contract subsisting was the original contract referred to in P.1 under which payment by instalments was only optional at the discretion of the respondents, what then was the necessity for obtaining P.3?

On the first issue the learned trial judge came to the conclusion that the original contract was not a lump sum or entire contract. It is difficult to see how he could have come to this conclusion if he had in mind only the terms mentioned in clause A4 or B4 of P.1. It is highly probable that in coming to the conclusion he did, he had in mind the new terms agreed to by the parties, for he said in his judgment and I quote: "The contract work, to my mind, was so greatly altered, that the work actually done cannot be regarded as done under it at all."

With regard to the second issue, the learned trial judge held on the evidence that the respondents were estopped from relying on the promise given by the appellant in P.3 on the ground that they had waived their right by ordering the architect to issue the 5th progress payment certificate. Without going into the merits of this ground, I would say that the promise made appears to be gratuitous and is therefore not enforceable as an agreement by virtue of the provisions of section 26 of the Contracts (Malay States) Ordinance.

There is no direct evidence on record to indicate whether the sum of $36,000 claimed under the architect's certificate is in respect of work done under the contract which displaced contract "A" or under contract "B", or under both. The architect arrives at the figure of $36,000 by computing in the following manner. The value of the work done under contract "B" up to the 24th of July, 1964 is estimated at $70,000 and the value of the work under the other contract at $145,000. For some reason not apparent on the face of the certificate the 10% retention money is not deducted in respect of $70,000 but the same is deducted from $145,000 which leaves a balance of $130,500. The omission is probably due to an oversight. Then from the total of $200,500 the sum of $164,000 being the amount previously paid to the appellant is deducted leaving a balance of $36,000. However, from the facts given in the certificate it would appear that the total value of the work done up to the 24th of July, 1964 amounted to $215,000 and the amount then outstanding and payable to the appellant was $51,000 but since he had limited his claim to $36,000 that must remain the limit of his claim.

But apart from the questions of whether the sum of $36,000 is payable as a contractual obligation or not, it was the contention of learned counsel for the appellant that the claim was payable in any event since the contract had been rescinded by the respondents. In support of this

argument he relied on the provisions of sections 40, 65 and 66 of the Contracts (Malay States) Ordinance 1950. Counsel for the respondents objected to the appellant invoking the aid of these sections for the first time on appeal.

Now section 40 of the Contracts (Malay States) Ordinance 1950 provides that "when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance." The effect of this section is to render a contract which a promisor refuses to perform or disables himself from performing, voidable at the option of the promisee. The respondents had rescinded the contract by their letter of the 7th of October because the appellant, according to them, had repudiated it by abandoning the work.

When a contract is rescinded under section 40 two consequences follow. According to section 65 "when a party at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit so far as may be, to the person from whom it was received."

According to *Pollock & Mulla* (8th Edition) at page 383, it was once thought that the provisions of section 64 of the Indian Contract Act (corresponding to our section 65) applied only to contracts which were voidable *ab initio* and not to contracts which subsequently became voidable under section 39 (corresponding to our section 40). This point has now been settled in *Muralidhar Chatterjee* v. *International Film Co. Ltd.*[4] where the Privy Council has held that section 64 of the Indian Act applied to cases of rescission under section 39.

Under the provisions of section 65, the obligation to restore any benefit received is restricted to the party rescinding a contract but under section 66 the obligation is extended to any party who had gained an advantage or benefit under the contract. But this section deals with contracts which are discovered to be void or which becomes void. It would include voidable contracts which became void by rescission. To refer again to *Pollock & Mulla* at page 383, the learned authors say: "Whenever one party to a contract has the option of annuling it, the contract is voidable; and when he makes use of that option the agreement becomes void."

If the principle embodied in sections 40, 65 and 66 are applied to the facts of this case, then the respondents are obliged to pay the sum of $36,000 to the appellant irrespective of whether the contract was a lump sum or entire contract or not.

The objection raised by counsel for the respondents is misconceived; for it is not a question of a failure to raise a point of law in the lower court but a question of whether the issues had been resolved in accordance with the law of the land.

The learned trial judge was therefore right in allowing the full amount of the $36,000 claimed under item (c) of the statement of claim. In the result the appellant must succeed in his total claim to the extent of $63,395, interest and costs.

In regard to the counter-claim for damages, the learned trial judge, on the assumption that only one contract subsisted between the parties and that the contract was not a lump sum contract, held that it was the appellant who had, by his refusal to complete the work on account of the non-payment of the 5th progress payment, repudiated the contract. In coming to this conclusion he relied on the principle applied in determining whether a breach had been committed in respect of a contract for sale of goods by instalments as stated in *Hudson* at page 244 as follows:

> "The tendency has been to hold that mere non-payment of an instalment due in respect of goods does not constitute a repudiation, while a general refusal to pay instalments on the due date will do so. (*Withers* v. *Reynolds* (1831), 1 L.J. K.B. 30)."

But even if the assumptions of the learned trial judge are correct and he is right in applying the principle aforementioned to building contracts, I cannot subscribe to the view that the refusal by the respondents to pay the 5th progress payment was only a refusal to pay that particular instalment. It was, in my opinion, a general refusal to make any interim payments in the future by virtue of the gratuitous undertaking in P.3.

I am unable to find any reason for regarding contracts "A" and "B" as one contract. The terms of each contract and the contract prices are stated separately in P.1 which incidentally is not a contract in writing dated the 8th of August, 1963 as stated in paragraph 2 of the statement of defence but a letter dated the 29th of July, 1963 confirming the terms previously agreed upon in respect of the two oral contracts.

I am also unable to find any reason for holding that contract "B" was not a lump sum or entire contract. If interim payments had been made in regard to contract "B" they should not be regarded as evidence of any modification of the original terms but as advances made in the terms mentioned in clause B4 of P.1. In the circumstances, the refusal by the appellant to carry on the work in respect of contract "B" because of non-payment of the 5th progress payment clearly amounted to a repudiation of the contract. The respondents had therefore

rightly rescinded contract "B" and are entitled not only to claim compensation for damages under the provisions of section 75 of the Contracts (Malay States) Ordinance but also for the restoration of any advantage, if any, received by the appellant under the contract by virtue of the provisions of section 66.

The same, however, could not be said of the other contract for the construction of the stores. For reasons stated hereinbefore the then subsisting contract was not a lump sum contract and the appellant was entitled to proceed with the work only if he was adequately remunerated on *quantum meruit* from time to time for work done. The respondents must therefore be deemed to have repudiated the contract by their general refusal to make any interim payments in the future. Since the contract was not rightfully rescinded, there can be no question of any claim for compensation for damages under section 75 of the Ordinance. The respondents are, however, entitled under section 66 to claim for restoration of the advantage, if any, received by the appellant under the contract.

As evidenced by the 5th progress payment certificate, the appellant had in respect of the contract for the construction of the stores completed by the 24th of July, 1964 work to the value of $145,000; but according to Mr. MacDonald's estimate the value of the work done was $113,000. However, both these figures may be correct for the differences as pointed out hereinbefore may well be the cost of the demolition of the 4½" brick walls and rebuilding the same with 9" brick walls. According to the evidence, the appellant had been paid a sum of $164,500 as against $217,900 worth of work according to Mr. MacDonald, done under both the contracts, but it is not possible to ascertain from the evidence what amount was paid in respect of each contract. The onus is upon the respondents to prove the value of the benefit received by the appellant for the purpose of establishing their claim under section 66 of the Ordinance. In this they have failed.

Counsel for the appellant also submitted. on the assumption that there was only one contract, that the whole of the counter-claim should be dismissed because the claim was based on the alleged breach of a contract which by mutual consent had been so altered as to constitute a new contract; and contended that by virtue of the substitution of a new contract the appellant was relieved of any obligation to perform the old. As far as I can concede to this argument, the point taken may be relevant to the contract for the construction of the stores only.

The effect of novation is dealt with in section 63 of the Contracts (Malay States) Ordinance 1950. It reads as follows:

"63. If the parties to a contract agree to substitute a new contract for it or rescind or alter it, the original contract need not be performed."

The equivalent section in the Indian Contract Act is section 62. The scope of this section was considered in *Balak Ram* v. *Telu.*[5] In that case the parties had agreed to substitute a bond for money due on an account but the plaintiff had sued the defendant on the original contract. The following observations of Din Mohamed J. seem relevant, and I quote:

"From the clear wording of this section it will appear that it is not always necessary to prove that a new contract had been substituted. It is enough if an alteration in the original contract is proved. . . . The plaintiff claimed interest on the original account on the basis of an oral agreement. The bond, however, did not provide for it. Further the original entry could be sued upon at once while the bond provided for payment by instalments. It is clear therefore that the terms of the original contract were varied in this case and this variation will, in my opinion, be sufficient to absolve the defendant from performance of his original contract. In the authorities cited above substitution of a new contract alone appears to have been pleaded and considered. So far as I have been able to see there is no reference therein to the variation of the terms of the original contract. Those cases therefore are no authority for the proposition that even if the terms were varied, the plaintiff can still fall back upon the original contract."

Counsel for the respondents, however, submitted that it was not open to the appellant to argue on appeal a point of law not taken in the court below and cited local and English authorities in support of his proposition. In *Attorney-General* v. *Pang Ah Yew*,[6] Reay J. observed as follows:

"The courts have often commented on the impropriety of raising, on appeal, questions that have not been raised at the hearing. In *Garden Gully Co.* v. *McLister*, 1 App. Cas. 39, their Lordships of the Privy Council said that though not holding parties strictly to their pleadings, they would not allow defences to be set up on appeal which had not been suggested in the pleadings or called to the attention of the courts below, and have refused in other cases to allow such points to be raised."

Lord Finlay L.C. in *Banbury* v. *Bank of Montreal*[7] said:

"The course of practice has always been regarded as well settled that points of law alleged entitling the party raising them to verdict or judgment must be made, at the trial, and that if they are not then made they cannot be raised afterwards."

The observations of Reay J. and Lord Finlay L.C. appear to be based on the general principle that where a decision on a question of law is dependant upon a finding of fact which was not made by a judge or jury because the question was not raised or put at the trial or where the question of law cannot be resolved without further evidence not available on the record, a court of appeal would not interfere with the judgment or verdict of the lower court.

This principle, however, is subject to certain exceptions. In *Banbury* v. *Bank of Montreal, supra,* Lord Parker said:

"There are no doubt cases in which the court of appeal have refused to allow points of law not taken in the court of the first instance to be raised on appeal. But these cases do not go to jurisdiction, but to discretion. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the jury. In such cases it would be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal. In the present case there is no such element of unfairness or injustice. It is not suggested that had the point been taken below any further evidence could have been adduced, or any further or different question left to the jury. Why, then, should not the Court of Appeal have felt itself at liberty to do complete justice between the parties on the evidence before them? I can see no reason at all."

Lord Wrenbury in the same case says the following:

"It would require a great deal to persuade me that a Court of Appeal is bound to adjudicate wrongly because it had not occurred to either judge or counsel to raise a point of law in the court below. The way the appellant seeks to put it is that the Court of Appeal is not in such case asked to decide wrongly, but only to say that the point is one which it is not competent to them to decide at all because it was not argued below. The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because of a point of law has been overlooked below. It may well be that under the circumstances the Court of Appeal could not justly allow the point of law to be raised. For instance, it may be that if the point had been raised in the court of the first instance the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no doubt say that it would not be fair to allow it to be raised. But that is a totally different thing from saying that it cannot be raised."

Two points emerge from the observations of Lord Parker and Lord Wrenbury. They are, first, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction; and, secondly, a Court of Appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order.

In the *"Tasmania"* case [8] it was held that a Court of Appeal was competent to decide even a question of fact raised for the first time on appeal provided, "if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case, if the controversy had arisen at the trial; and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box." (See judgment of Lord Herschell).

It is clear from the record that all the facts necessary for the determination of the point of law raised under section 63 of the Contracts (Malay States) Ordinance were before the trial court. The facts were pleaded in paragraph 2 of the reply to the statement of defence, and Mr. Rajasooria on behalf of the appellant did raise the issue by saying that the variation of the terms amounted to a novation of contract which nullified the original contract. Moreover, on the question of whether there had been an alteration in the terms of the original contract, the learned trial judge had held that the work done cannot be regarded as done under it at all. However, I would go further and say that the question of whether section 63 of the Contracts (Malay States) Ordinance applied to the facts of this case would raise a question of jurisdiction, for if it did, the trial court could not have adjudicated on an alleged cause of action which at the time material to the issues in this case did not exist.

Therefore on this ground of appeal also, the counter-claim in so far as it relates to the contract for the construction of the stores should be disallowed.

I shall now deal with the counter-claim in respect of the breach of contract "B". The counter-claim as framed by the respondents falls under three heads, namely:

(1) Damages for breach of contract;

(2) Expenses incurred and likely to be incurred in employing other persons to remedy and complete the works; and

(3) Damages for the delay and loss of use of the premises.

The general principles governing damages for breach of contract was first enunciated in *Hadley* v. *Baxendale.* [9] The principles are explained in *Hudson* at page 437 as follows:

"Briefly, the injured party is entitled to be indemnified against any loss likely to arise in the usual course of things from the breach, and also such other loss outside the usual course of things as was in the contemplation of the parties at the time of the contract as the likely result of the breach of it. In the latter class of case, the knowledge of the defendant must have been brought home to him in such circumstances that he impliedly undertook to bear any special loss referable to the breach."

Now the claim under items (2) and (3) of the counter-claim fall under the first and second branch, respectively, of the rule in *Hadley* v. *Baxendale, supra,* and strictly speaking, they also fall within the ambit of the claim under item (1) thereof. In the absence of proof of any damages under item (2) and (3), a claimant will only be entitled to nominal damages for breach of contract.

It is therefore necessary to consider first the claims under items (2) and (3). The principles on which damages are assessed in respect of defective and incomplete work is stated at page 442 of *Hudson* as follows:

"In those cases where, in breach of contract, the work has been left incomplete, whether by abandonment, termination or otherwise, or containing defects, the direct measure of damage will be the difference between the reasonable cost to the employer of repairing the defects or completing the work, together with any sums paid

by or due from him under the contract, and the sums which would have been payable by him under the contract if it had been properly carried out. Where the former does not exceed the latter, only nominal damages would be recoverable. Such damages are clearly recoverable within the first branch of the rule in *Hadley* v. *Baxendale* as likely to arise in the usual course of things from the breach."

We have in evidence the estimates in regard to the work done, the work yet to be done and the cost of remedying defects in the office building. Mr. MacDonald said, and I quote:

"Amount of work completed on office block is $72,900. This building was not completed. $9,600 is needed to complete this work in the building according to plan. I also found some defective work which required to be remedied, and that would cost $2,800."

The contract price under contract "B" is $82,500. The respondents adduced no evidence to indicate the amount paid towards the contract price. In order to give the most possible advantage to the respondents, the amount may be assessed on the available evidence on the basis that the amount paid by them were paid, first, towards the discharge of their legal obligation under the contract for the construction of the stores, and secondly, in the exercise of their discretion to make advances under contract "B". The total amount paid to the appellant under both contracts was $164,500. The total value of work done under both contracts is $217,900. As against the difference of $53,400 the sum of $36,000 awarded to the appellant in this action and a sum of $16,100 being the estimated cost of remedying defects in the construction of the office building and store "A" must be deducted. In this connection it must be pointed out that Mr. MacDonald did not care to estimate the cost of remedying the defects in stores "B" and "C" because in his opinion they should be demolished and reconstructed; but the respondents appear to have had the buildings completed by another contractor without demolishing them. In any event, the onus was upon the respondents to prove the cost of remedying the defects in stores "B" and "C", if any. It would therefore appear from the evidence that far from the appellant being under any obligation to restore any benefit he may have received under the contract, it is for the respondents to restore, by virtue of the provisions of sections 65 or 66 of the Contracts (Malay States) Ordinance, the benefit to the value of $1,300 which they had received under the contract. The respondents' claim under item (2) of their counter-claim must therefore fail.

The respondents, however, claim that they had suffered further loss outside the usual course of things by the delay in completing the building within the stipulated time and by the loss of the use of the premises. Under the original agreement the appellant undertook to complete the work within 6 months of the date of acceptance of the tender. The tender was accepted on the 8th of August, 1963 and the last date of the completion of the work was the 8th of February, 1964. On the question of delay the learned trial judge held that under the contract time was the essence and the work should have been completed by the 8th of February, 1964. Nowhere is stated in P.1 that the parties regarded time as the essence of the contract. In *Haji Hassan* v. *Tan Ah Kian* [10] the Federal Court held that unless a specific provision existed in a contract to the effect that time was the essence of the contract, it was not. But the court also held that time would be the essence of the contract where it was not originally stated to be so, but had been made so by one party by giving reasonable notice to the other, who had failed to perform the contract with sufficient promptitude.

In the instant case a notice was given to the appellant by a letter (D.20) dated the 8th of May, 1964 informing him that the company intended to use the office building before the middle of June and to complete the work before then. The question is whether the notice was a reasonable one. In view of the fact that the target date fixed for the completion was the 8th of February and the alterations and additions to the original plan did not affect the construction under contract "B", I must hold that the notice was a reasonable one.

As for the loss of the use of the premises as an office building, no evidence was called to prove the loss in terms of rental or otherwise which the respondents stood to lose by the delay. But there can be no doubt that the respondents had been inconvenienced by the delay in completing the office building. The learned trial judge assessed damages for the delay and loss of use of the premises under contract "A" and "B" at $10,000. Considering the greater commercial importance of godowns to sugar manufacturers than mere office accommodation, I will assess the damages under items (1) and (3) of the counter-claim at $5,001.

The appeal by the appellant is therefore allowed with costs and the counter-appeal by the respondents is dismissed with costs. The judgment of the learned trial judge is hereby set aside and judgment entered for the plaintiff/appellant for $63,395, with interest thereon at 6% per annum from 24th December, 1964 to date of realisation and costs of the suit. There will be judgment for the defendants/respondents on the counter-claim for $5,001 and costs.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal allowed. Counter appeal dismissed.

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